United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

833

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,888

UNITED STATES OF AMERICA,

Appellee,

v.

LUTHER L. POWELL,

Appellant.

Appeal from a Judgment of the United States District Court for the District of Columbia.

BRIEF FOR APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether the instructions given the jury with regard to the permissive inference from possession of recently stolen goods were so incomplete as to mislead the jury and shift the burden of persuasion to defendant, thereby depriving Powell of a fair trial.

2. Whether the trial court's instruction that the reasonable doubt standard did not apply to proof of one element of the offense deprived Powell of due process of law.

3. Whether the failure of the trial court to give the jury a cautionary instruction with regard to testimony of Powell's prior conviction denied him a fair trial.

Pursuant to U. S. Appeals D. C. Rule 8(d) this case has not been previously before this Court.

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LUTHER L. POWELL, Appellant

Appeal from a Judgment of the United States District Court for the District of Columbia.

STATEMENT OF THE CASE.

An indictment was filed in the District Court for the District of Columbia April 28, 1969 charging Defendant Powell with violations of 22 D.C. Code §2201 (grand larceny) and 22 D.C. Code §2204 (unauthorized use of vehicle). Powell pleaded not guilty to both charges on May 9, 1969. The charges came on for

Ref. to Rulings: None

trial before Judge Youngdahl and a jury on September 11, 1969. At this time the Judge, sua sponte, dismissed the charge under 22 D.C. Code §2201 (grand larceny) (Transcript of trial page 5)* A verdict of guilty was returned as to the second charge on September 16, 1969. On December 12, 1969, Powell was sentenced to twelve to thirty-six months imprisonment. On December 22, 1969, appellant filed notice of appeal in forma pauperis and on December 29, 1969, by order of the District Court, Powell was authorized to appeal without prepayment of costs, and in the same order, Judge Youngdahl authorized preparation of a transcript at Government expense, and referred appointed of counsel to the Court of Appeals. Present counsel was appointed by order of this Court filed March 3, 1970.

The prosecution called two witnesses in the presentation of its case at trial: the Assistant Manger of the Yellow Cab Company (owners of the vehicle in question) (Tr. 22), and the arresting officer (Tr. 31). These two witnesses established, (1) that the vehicle had not been checked out from the Yellow Cab lot (Tr. 25), and (2) that Powell was driving the vehicle when

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*/ Hereinafter "Tr. ___".

the officer stopped it for an expired insurance sticker (Tr. 34). Defendant Powell then took the stand (Tr. 43), and testified as to the explanation of his possession of the presumptively stolen vehicle, in the course of which testimony he revealed that he was serving a sentence in work-release status at the time of his arrest.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1291.

ARGUMENT

I. THE TRIAL COURT'S INSTRUCTIONS WERE INCOMPLETE AND ERRONEOUS AND THUS DEPRIVED POWELL OF DUE PROCESS AND A FAIR TRIAL

Upon instructions of the trial court which failed to guide the jury with respect to the only contested elements of the offense, Appellant Powell was convicted of unauthorized use of a vehicle.

The trial court properly instructed that:

> "The elements of this offense are as follows:
>
> "First, that the motor vehicle in question was stolen by someone.
>
> "Second, that the defendant took the vehicle or that he used, operated, or removed it within the District of Columbia.
>
> "Third, that at the time the defendant used, operated or removed the vehicle, he knew it was stolen.
>
> "Fourth, that the vehicle was driven or caused to be drived [sic] for the defendant's own profit, use or purpose." (Tr. 83)

As to the first element, a representative of the owner, Yellow Cab Company, testified that the vehicle had not been checked out from the cab company lot in accordance with established procedures, and there is no evidence in the record to contradict this testimony.

As to the second element, the arresting officer testified that the defendant had operated the vehicle, and there is no evidence in the record to contradict this testimony.

The case turned entirely upon whether defendant "knew [the vehicle] was stolen" and whether "the vehicle was used for defendant's own profit, use or purpose." The only testimony as to these elements was that of the defendant and he denied both guilty knowledge and conversion of the vehicle.

In this posture of the case, then, with no direct evidence other than the defendant's denial as to guilty knowledge, or "the intent to appropriate the vehicle to a use

inconsistent with the property rights of the person from whom it is taken," (Pennsylvania Indemnity Fire Corp. v. Aldridge, 73 App. D.C. 161, 117 F.2d 774 (1941)), the defendant plainly had no burden of persuasion. The only way in which the jury could find these essential elements of the crime charged was by drawing the "permissive inference," (Travers v. United States, 118 U.S.App. D.C. 276, 335 F.2d 698 (1964)) of these elements from other proven facts and circumstances. Clearly, then, it was essential that the jury be properly instructed with regard to the legal rules governing this inference.

> "While an unexplained or unsatisfactorily explained possession of freshly stolen property is prerequisite to any utilization of the inference, fundamental principles exclude the idea that the inference can be destroyed only by a wholly satisfactory explanation by the accused. For the accused has no burden of persuasion; rather, any reasonable doubt as to his guilt, however arising, demands his acquittal, whether or not there is but an unsatisfactory explanation, or indeed no explanation at all."
>
> Pendergrast v. United States, 133 U.S. App.D.C. ___, 416 F.2d 776, 789 (Jan. 31, 1969)

As the prosecuting attorney indicated in his closing argument (Tr. 65), Powell's explanation of his possession of the vehicle if believed by the jury required acquittal. But, as this Court declared in Pendergrast, if the jury did not fully believe Powell's explanation it could not for that reason convict. In these circumstances only a clear and comprehensive instruction by the trial court could have protected Powell's constitutional right to a fair trial. This the trial court failed to give.

The trial court's failure to give a proper instruction is not only plain error, but also incomprehensible in view of the model instruction "commend[ed] to the serious consideration" of the district court judges in this circuit and set forth in the appendix to the Pendergrast case. In Pendergrast, the Court of Appeals stated:

> "We have a rather clear idea of the frequency with which the judges of the District Court are called upon to charge juries on this aspect of the law, and an acute awareness of the pitfalls encounterable in that undertaking. To the end that the judges and the practicing bar may be assisted in this

> regard, and incidental controversies may be held to a minimum, we set forth in an appendix to this opinion a form of instruction which may serve as a model, not only in robbery cases, but by adaptation in the prosecution of any larceny-type offense. And we commend to the serious consideration of all who may be interested the principles we have endeavored to articulate therein. (Emphasis added.) 133 U.S.App.D.C. at ___, 416 F.2d at 790.

The instruction in this case was plainly "an equivocal direction to the jury on a basic issue,"[1/] (Bollenbach v. United States, 326 U.S. 607, 613 (1946) as can be seen by comparison of the trial court's instruction with that approved in Pendergrast.

1/ In the Bollenbach case, Justice Frankfurter explained:

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue *** The Government's suggestion really implies that, although it is the judge's special business to guide the jury by appropriate legal criteria through the maze of facts before it, we can say that the lay jury will know enough to disregard the judge's bad law if in fact he misguides them. To do so would transfer to the jury the judge's function in giving the law and transfer to the appellate court the jury's function of measuring the evidence by appropriate legal yardsticks." (326 U.S. at 613-14)

Trial Court's
Instruction
on Inference

The elements of this offense are as follows:

First, that the motor vehicle in question was stolen by someone. Second, that the defendant took the vehicle or that he used, operated or removed it within the District of Columbia. Third, that at the time the defendant used, operated or removed the vehicle, he knew it was stolen. Fourth, that the vehicle was driven or caused to be driven for the defendant's own profit, use or purpose. It is not necessary for the government to prove beyond a reasonable doubt that the vehicle was used for the defendant's profit or purpose or used for any particular length of time as long as the government has proved beyond a reasonable the other elements of the offense and proved that the defendant used it for some period of time for his own use or profit.

Pendergrast
Model Instructions
on Inference

In weighing the evidence adduced at this trial, you may consider the circumstance, if you find that it is established beyond a reasonable doubt, that the defendant had the exclusive possession of property specified in the [count of the] indictment, recently after that property was stolen in the robbery alleged therein. You are not required to draw any conclusion from that circumstance, but you are permitted to infer, from the defendant's unexplained or unsatisfactorily explained possession of the recently stolen property, that the defendant is guilty of the offense, if in your judgment such an inference is warranted by the evidence as a whole.

In order to justify a verdict of guilty on a charge of Unauthorized Use of a Vehicle, it is not necessary to show that the defendant stole the vehicle. It is sufficient to show that the defendant, with a specific intent, drove or used the vehicle knowing it to have been stolen. Knowledge that the vehicle had been stolen ordinarily cannot be proved directly because no one can see the operations of the mind of another human being. Knowledge may be inferred from circumstances, things that are done, things that are said and the surrounding circumstances. (Tr. 83-84)

The defendant's possession of the recently stolen property does not shift the burden of proof. The burden is always upon the Government to prove beyond a reasonable doubt every essential element of an offense before the defendant may be found guilty of that offense. Before you may draw any inference from the defendant's unexplained or unsatisfactorily explained possession of property stolen in the robbery charged in the [count of the] indictment, you must first find that the Government has proved beyond a reasonable doubt every essential element of that offense, and as to those elements I have already instructed you. If you should find that the Government has proved beyond a reasonable doubt every essential element of that offense, the defendant's unexplained or unsatisfactorily explained possession of the recently stolen property is a circumstance from which you may find, by the process of inference, that the defendant was the person [one of the persons] who stole it. In short, if the Government has proved beyond a reasonable doubt every essential element of the offense of robbery charged in this case,

then, but only then, the defendant's unexplained or unsatisfactorily explained possession of property stolen in that robbery permits you to infer that the defendant was the robber [one of the robbers].

The word "recently," as used in these instructions, is a relative term, and it has no fixed meaning. Whether property may be considered as recently stolen depends upon all the facts and circumstances shown by the evidence. The longer the period of time since the theft of the property, the more doubtful becomes the inference which may reasonably be drawn from its unexplained or unsatisfactorily explained possession.

In considering whether the defendant's possession of the recently stolen property has been satisfactorily explained, you must bear in mind that the defendant is not required to [take the winess stand or] furnish an explanation. His possession may be satisfactorily explained by other circumstances shown by the evidence independently of any testimony by the defendant himself. And even though the defendant's possession of

the recently stolen property is unexplained or is not satisfactorily explained, you cannot draw the inference under consideration if on the evidence as a whole you have a reasonable doubt as to his guilt.

It is exclusively within your province to determine (a) whether property specified in the [count of the] indictment was stolen in the robbery alleged and, if so, (b) whether while recently stolen it was in the exclusive possession of the defendant and, if so, (c) whether the possession of the property has been satisfactorily explained, and (d) whether the evidence as a whole warrants any such inference.

If you should find that the Government has proved beyond a reasonable doubt every essential element of the offense of robbery charged in the [count of the] indictment, and that property specified in the [count of the] indictment was stolen as alleged, and that, while recently stolen it was in the exclusive possession of the defendant, you may draw, but you are not required to draw, from these circumstances the inference that the defendant is guilty of the offense of robbery charged in the [count of the] indictment, unless his possession of the property is satisfactorily explained by other circumstances shown by the evidence, or unless

on the evidence as a whole you have a reasonable doubt as to his guilt.

If you should find that the Government has failed to prove beyond a reasonable doubt every essential element of the offense of robbery charged in the [count of the] indictment; or if you should find that the Government has failed to prove beyond a reasonable doubt that property specified in the [count of the] indictment was in the exclusive possession of defendant while recently stolen; or if the defendant's possession of the stolen property is satisfactorily explained by other circumstances shown by the evidence; or if, on the evidence as a whole, you have a reasonable doubt as to the defendant's guilt then, in any one or more of these events; you must find the defendant not guilty of the offense of robbery charged in the [count of the] indictment.

The model instruction was approved by this Court on January 31, 1969. It was readily available to the trial court at the time of Powell's trial on September 11-12, 1969. Had the model instruction been used, this court would not now be confronted with improper and insufficient instructions as to reasonable doubt, permissive inference and explanation by the accused.

The lack of guidance to the jury caused by the trial court's improper instruction as to inferences of guilty knowledge and conversion was compounded by the trial court's erroneous instruction with regard to the application of the standard of reasonable doubt.

The trial court instructed the jury that:

> "It is not necessary for the government to prove beyond a reasonable doubt that the vehicle was used for the defendant's profit or purpose or used for any particular length of time as long as the government has proved beyond a reasonable doubt the other elements of the offense and proved that the defendant used it for some period of time for his own use or profit." (Tr. 83)

This instruction violated the Due Process Clause of the Fifth Amendment to the Constitution, which protected Powell against conviction except upon proof beyond a reasonable doubt of every element of the offense. The Supreme Court in the very recent case of In re Winship, ___ U.S. ___, 38 Law Week 4253 (March 31, 1970) laid to rest any question on this score:

> "Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 38 L.W. at 4255.

See also Speiser v. Randall, 357 U.S. 513 at 525-6 (1958).

Thus, the instruction plainly failed to meet the Constitutional mandate. Such a Constitutional deficiency could not have been "harmless beyond a reasonable doubt", and therefore is plain error. Chapman v. California, 386 U.S. 18 (1966).

II. THE FAILURE OF THE TRIAL COURT TO GIVE THE JURY A CAUTIONARY INSTRUCTION WITH REGARD TO TESTIMONY OF POWELL'S PRIOR CONVICTION DENIED HIM A FAIR TRIAL.

As the trial began the trial court was sensitive to the potential prejudice of Powell's prior conviction reaching the jury.

The trial court stated its unwillingness to allow impeachment of the defendant by evidence of prior conviction (Tr. 4) under its discretionary power spelled out in the line of cases including Luck v. United States, 121 U.S. App.D.C. 151, 348 F.2d 763 (1965) and Gordon v. United States, 127 U.S. App. D.C. 343, 383 F.2d 936 (1967).

At the outset of the trial defendant's counsel advised the trial court that Powell would take the stand and that his direct testimony explaining the circumstances of his possession of the vehicle would bring out the fact that he was incarcerated and serving a previous sentence at the time of his arrest. The trial court stated its intention to examine Powell on voir dire as to his awareness of the possible consequences of such testimony.

"Mr. Risher. The third, Your Honor, is really a footnote to the prior comment that the defendant will take the stand, that he will reveal in his direct testimony that he was incarcerated in the District of Columbia jail under a prior conviction at the time of this arrest.

"The Court. Have you fully explained to him the effect it may have to the jury?

"Mr. Risher. Yes, I have.

"The Court. At the proper time, after the government has rested, I want to voir dire the defendant, questioning him outside the jury as to whether he should take the stand in view that he is going to reveal that and be sure he agrees he should take the stand, that he doesn't accuse you later of forcing him to take the stand. If he doesn't he is entitled to the instruction that it shouldn't be considered any evidence of his guilt." (Tr. 4)

The voir dire was conducted outside the hearing of the jury at the close of the prosecution's case.

"The Court. Mr. Powell, will you approach the lectern, please? I want to interrogate you concerning whether or not you are going to take the stand to testify in your own behalf. Your counsel indicates to me that you have talked it over and you have decided you want to testify?

"Defendant Powell. Yes I have.

"The Court. Although it will appear in your testimony that you have been incarcerated for some other charge?

"Defendant Powell. Yes, I have.

"The Court. Even though that appears in your testimony and you realize the effect that might have upon the jury you still want to get on the stand and tell your story?

"Defendant Powell. Yes, I would.

"The Court. You understand you don't have to take the stand and testify in your own behalf unless you want to; do you understand?"

"Defendant Powell. Yes, sir.

"The Court. Despite this you want to take the stand and testify?

"Defendant Powell. I would like to.

"The Court. And you will be subject to cross examination by government's counsel.

"Defendant Powell. Yes, sir.

"The Court. Very well. You may proceed with your opening statement Mr. Risher." (Tr. 41-42)

The trial court was, therefore, plainly aware of the prejudicial risk that the introduction of Powell's previous conviction "would induce the jury to find him

guilty on his prior record rather than on the evidence in this case." Barber v. United States, 129 U.S. App. D.C. 193, 393 F.2d 517 (1968).

The logic of the trial court's concern should have led it one step further to a cautionary instruction to the jury that defendant's prior conviction must not be considered evidence of guilt in this case. Courts have long recognized that such cautionary instructions may not be completely curative. See Bruton v. United States, 391 U.S. 123 (1968); Luck v. United States, supra. But where the introduction of defendant's criminal record cannot be avoided in defendant's testimony in his own defense, fundamental principles of fair trial require at the least a cautionary instruction. In this case had the defendant remained silent the essential elements of the offense could have been found solely by inferences from other facts and circumstances. The defendant was unwilling to remain silent under these circumstances. Yet to testify on his own behalf was also to reveal his prior criminal record. The trial court asked:

> "you realize the effect that might have upon the jury [and] you still want to get on the stand and tell your story." (Tr. 41)

And the defendant replied:

"Yes, I would." (Tr. 41)

The obvious tension between the defendant's right to trial by a jury free of prejudice and the defendant's need to defend himself at his trial as he deemed best required the trial court's initiative to assure defendant of a fair trial. As this Court recognized in Lewis v. United States, 127 U.S. App. D.C. 115, 381 F.2d 894 (1967):

> "in the fair administration of justice some obligation is imposed by Luck upon the trial court and the prosecution, and the time may come when we shall not feel bound to ignore its principles merely because the defense does so."

It is intolerable that a defendant's constitutional right to trial before a jury free of prejudice should have to be threatened in order to swear his innocence of the crime with which he is charged. See Simmons v. United States, 390 U.S. 377, 394. (1968) This is plainly the case in which the fair administration of justice imposed an obligation upon the trial court to instruct the jury to disregard defendant's prior criminal record and confine its finding to the evidence presented in the trial of this case. The absence of such

a cautionary instruction is plain error and defendant's conviction must be reversed.

CONCLUSION

By reason of the foregoing, the judgment of the district court should be reversed and a new trial ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of May, 1970, a copy of the foregoing brief was served by delivering a copy thereof to the Office of Thomas A. Flannery, Esq., United States Attorney, attention John A. Terry, Esq., Assistant United States Attorney, U.S. District Court House, Washington, D. C., attorney for Appellee.

GERALD B. GREENWALD

ADDENDUM

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Title 22 of the District of Columbia Code, section 2204, provides:

> Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used, operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment.

Statement Pursuant to Rule 17(c) (2) (iii) of U.S. Appeals D.C. Rules.

Defendant desires the Court to read the following portions of the Reporter's transcript with respect to

Argument One: Tr. 75-84
Tr. 43-58
Tr. 65

Argument Two: Tr. 4
Tr. 41-42

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The Brief for Appellee advances three contentions. First, that since the Government did not request a charge as to the inference drawn from possession of recently stolen property, Appellant cannot complain about the jury's lack of direction in deciding the issue. (Brief for Appellee, p. 3).

Second, that doubt of the Court's meaning in its instruction on proof beyond a reasonable doubt was overcome by viewing the charge "in its entirety", and together with the statement as to the Government's burden to prove guilt beyond a reasonable doubt made by the Trial Court seventy-six pages earlier in the transcript. (Brief for Appellee, p. 4).

Third, that a cautionary instruction as to testimony of defendant's incarceration was unnecessary absent defense counsel's request, when the defendant raised the matter in the course of his own defense. (Brief for Appellee, p.5).

Defendant urges that he was denied a fair trial by reason of the Trial Court's failure properly to instruct the jury as to the standard of proof beyond reasonable doubt, permissible inference from possession of stolen property and the consideration of testimony of defendant's prior conviction. Appellee's Brief fails to answer defendant's argument.

ARGUMENT

1. Both Appellant's Brief and Appellee's Brief agree that all elements of the offense were established by uncontradicted direct evidence, except for the elements of defendant's knowledge that the vehicle was stolen and that he used it for his own profit,

use or purpose. The only testimony as to guilty knowledge and personal use was that of the defendant who denied both knowledge that the vehicle was stolen and his conversion of the vehicle. The jury was thus called upon to infer proof of these elements from the surrounding circumstances established by direct evidence, but could not properly infer such proof from disbelief of defendant's testimony.

The Trial Court, ignoring this Court's model instruction in the Pendergrast case 1/, failed entirely to instruct the jury on the Government's burden of proof in such circumstances. The conclusion in Appellee's Brief that "since no such instruction was in fact given, we fail to see any basis for Appellant's argument" (p.3),ignores the issue before this Court. The jury in this case was left without proper guidance on a crucial jury determination, left at best with "an equivocal direction to the jury on a basic issue". Bollenbach v. United States, 326 U.S. 607, 613 (1946). The failure of the Court to give a proper instruction on permissive inference in this case was reversible error.

2. By conceding that "all doubt of the Court's meaning might have been erased by inclusion of the words 'beyond a

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1/ Pendergrast v. United States, 133 U.S. App.D.C. ___, 416 F.2d 776 (January 31, 1969).

reasonable doubt' after the word 'proved' on page 83, line 21 of the transcript", Appellee's Brief (p. 4) recognizes that some doubt existed at the time the trial court instructed the jury.

The Appellee's Brief invokes the rule that a defect in a portion of a trial court's instruction can be cured by a consideration of the entire charge.2/ But as this Court has ruled, "such is the case only as to harmless error which may be held not to require reversal under the statutory provision because it does not affect the 'substantial rights' of the parties". United States v. Hayward ___U.S.App.D.C.___, 420 F.2d 142, 144.

An instruction that an element of the offense may be proved by less than proof beyond a reasonable doubt plainly affected the defendant's "substantial rights", and violated his constitutional protection "against conviction, except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged." In Re Winship, 397 U.S. 358, 364 (March 31, 1970).

2/ It is ludicrous, however, for Appellee to argue that consideration of the charge in its entirety can be stretched to include the remarks as to reasonable doubt made to the jury by the Trial Court seventy-six pages earlier in the transcript.

Appellee's Brief cites Thurman v. United States,3/ for the proposition that this Court's task is to determine whether asserted error in the charge created a "likelihood of misleading the jury to the extent that it is more probable than not that an improper verdict was rendered." But Thurman's language must be tempered by the standard declared by the Supreme Court and this Court, namely, "the question is not whether guilt may be spelled out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts". Bollenbach v. United States, 326 U.S. 607, 614, cited with approval by this Court in United States v. Hayward, supra.

The error asserted here is that the Trial Court's instruction was at best ambiguous as to the Government's need to prove each element of the offense beyond reasonable doubt. The reasonable doubt standard is one of constitutional stature (In Re Winship, supra), and consequently, the proper standard for this Court to apply here is whether the asserted error in the charge was "harmless beyond a reasonable doubt." As this Court pointed out in Hayward:

3/ ___U.S.___App.D.C. ____, 417 F.2d 752, 753 (1969).

"When the error which is challenged on appeal goes to a basic constitutional right, such as the right to trial by jury in issue here, the error will rarely be considered harmless. The Supreme Court has pointed out that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." Chapman v. California, 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); see also Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed. 2d 284 (1969). The Court therefore held that, while there are some constitutional errors which could be so unimportant and insignificant that they could be deemed harmless, before such a federal constitutional error will in fact be held harmless, "the court must be able to declare a belief that it was harmless beyond a resaonable doubt." (420 F.2d, at 425)

3. Appellee's Brief would limit the principle of Luck v. United States 4/ to protection of the criminal defendant from an overzealous prosecutor. The Luck doctrine is not so limited. As this Court has recognized, Luck is concerned with the fundamental fairness of a criminal trial in which the defendant, defense counsel, government counsel and the judge are all participants. See Lewis v. United States, 127 U.S.App.D.C. 115, 381 F.2d 894 (1967). Defendant's prior conviction was revealed as a necessary part of his explanation of innocence. In such circumstances neither defense counsel not government counsel could have protected the defendant from the prejudicial effect of this testimony upon

4/ 121 U.S.App.D.C. 151, 348 F.2d 763 (1965).

the jury. Only the judge could do so by a cautionary instruction to the jury, and he failed to act.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of August, 1970, a copy of the foregoing brief was served by delivering a copy thereof to the office of Thomas A. Flannery, Esq., United States Attorney, attention John A. Terry, Esq., Assistant United States Attorney, U.S. District Court House, Washington, D. C., attorney for Appellee.

Gerald B. Greenwald